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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 501

OSCAR EVERETT TAYLOR, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutory Provisions Involved	2
Statement of the Case	4
Reasons for Granting the Writ	9
1. The Fourth and Fifth Amendments to the Constitution were violated when the Government introduced over defense objection evidence of Petitioner's undertaking and subsequent failure to produce personal papers to prove his innocence	9
2. The Due Process clause of the Fifth Amendment was violated when the District Court allowed the jury to regard Petitioner's failure to produce personal papers in proof of his innocence as positive evidence of guilt	10
3. The Fourth and Fifth Amendments entitled the Petitioner under interrogation to a warning when requested to produce personal papers that his protection against unreasonable searches and seizures and self-incrimination relieved him from any obligation to produce such papers	11
4. The erroneous decision of the court of appeals permits application of the mail fraud statute to a myriad of circumstances beyond the appropriate reach of federal jurisdiction	12
Conclusion	15
Appendix	1a
a. Order of court of appeals affirming conviction	1a
b. Order of court of appeals denying rehearing	2a
c. Excerpt from trial testimony of Mitchell Glassman	2a
d. District court's instructions to the jury	4a

CITATIONS

Cases:	Page
Boyd v. *United States*, 116 U.S. 616 (1886)	9, 12
Kann v. *United States*, 323 U.S. 88 (1944)	12
Malloy v. *Hogan*, 378 U.S. 1 (1964)	10
Mapp v. *Ohio*, 367 U.S. 643 (1961)	10
Miranda v. *Arizona*, 384 U.S. 436 (1966)	12
Pereira v. *United States*, 347 U.S. 1 (1954)	12, 13

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The Petitioner, Oscar Everett Taylor, Jr., respectfully prays that a writ of certiorari issue to review the per curiam order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 12, 1970.

OPINION BELOW

The order of the Court of Appeals, not yet reported, appears in the appendix hereto. Portions of the trial proceedings in the District Court of the United States for the Eastern District of Kentucky-Lexington also appear in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 12, 1970. A timely petition for rehearing was denied on July 8, 1970, and this

petition for certiorari was filed within thirty days of that date. The Court's jurisdiction is invoked under Title 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Petitioner's rights under the Fourth and Fifth Amendments to the Constitution were violated when the district court permitted a postal inspector to testify before the jury over Defense objection that Petitioner had promised repeatedly but failed to deliver documents to indicate that funds obtained from the Government's witness had not been expended for Petitioner's personal needs.

2. Whether the Petitioner's Fifth Amendment protection against deprivation of liberty without due process of law was violated when the trial court's instruction permitted the jury to regard Petitioner's failure to produce exonerating documents as positive evidence of guilt, thereby shifting to the Petitioner the burden of proving his innocence.

3. Whether the courts below erroneously interpreted the rule in *Pereira* v. *United States*, 347 U.S. 1 (1954) with respect to whether petitioner "caused" a letter to be delivered as incident to an essential part of a scheme in violation of the federal mail fraud statute.

STATUTORY PROVISIONS INVOLVED

United States Constitution, AMENDMENT IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Code, Title 28:

§ 1341. *Frauds and Swindles.* Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or article or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

During May and June of 1964, Petitioner made frequent trips from his home in Danville, Kentucky to Jackson, Mississippi to attend a course of instruction in the Order of Masons and to visit his wife's family. He was, at that time, a licensed securities salesman for Insurance Investors Trust Company, a private Kentucky corporation engaged in a variety of financial ventures wholly within the Commonwealth of Kentucky.

Petitioner struck up an acquaintenance with Kenneth McAninch at the Masonic Temple in Jackson, and the two spent much of their free time together for several months. McAninch had certain unproductive investments and became interested in Petitioner's account of the activities of Insurance Investors Trust Company. On May 29, 1964, at Jackson, he gave Petitioner two checks totalling two thousand dollars ($2,000.00), which Petitioner was to invest for McAninch's benefit. Petitioner then returned with the checks to Kentucky, having told McAninch he would come back to Jackson later and could receive more money from him at that time. (A-153a).*

On June 8, 1964, McAninch purchased a cashier's check in the amount of five thousand forty dollars ($5040.00) payable to Petitioner. The same day he mailed it to Petitioner at his home in Danville, Kentucky. After placing the check in the mail, McAninch telephoned Petitioner to say, "I'm mailing you a cashier's check for $5040.00". Petitioner replied, "Well, Kenneth, we are coming down. There's no

*References are to the Appendix filed by Petitioner with the Sixth Circuit in connection with his appeal, which has been certified to this Court as part of the proceedings below.

need to do this."; but McAninch told him that the check was already in the mail. (A-153a). Petitioner received the check through the mail at his home in Danville, Kentucky on June 11, 1964.

On June 16, 1964, Petitioner returned to Jackson where he met once again with McAninch to discuss various possible investments. On that occasion, McAninch gave Petitioner a check for four thousand dollars ($4,000.00). (A-62a-64a). All the checks drawn by McAninch were deposited to Petitioner's bank account in Danville, Kentucky. (A-171a).

During August of 1964, Petitioner arranged to fly to Jackson, where, in company with several others he met again with McAninch to inform him that his money had not been invested and to propose that it be devoted to a new business organized by Petitioner and his brother. This was to be a business of finding sources of capital for large real estate developments all over the country. McAninch agreed, expressing his confidence in Petitioner. (A-158a).

Petitioner travelled extensively throughout the United States during the next year. Success with the new business eluded him, however; and, as his expenses mounted he finally lost all the money that had been placed at his disposal. (A-162a).

During the next several years McAninch contacted Petitioner from time to time demanding the return of his money, but Petitioner was able to repay only one thousand dollars ($1,000.00). (A-70a).

A Federal Grand Jury indicted Petitioner for mail fraud on October 23, 1967. (A-4a), and a jury trial was held in United States District Court for the Eastern

District of Kentucky on September 9 and 10, 1969. The court's jurisdiction was grounded upon Petitioner's alleged receipt of McAninch's check by mail delivery on June 11, 1964, at his home in Danville, in the Eastern District of Kentucky. Petitioner was convicted of the charge, and received a sentence of two years in the Federal Penitentiary. (A-212a).

Petitioner testified at his trial that he had not requested McAninch to mail any check to him. (A-173a, 174a). McAninch testified that although he knew of Petitioner's intention to return to Jackson he mailed the check because, "It might be some time in the future" before Petitioner came. (A-66a).

McAninch testified that he had not sought Petitioner's indictment. (A-82a), and he conceded that, based upon the nature of their relationship Petitioner "perhaps did" conclude that he had McAninch's general authority to invest in whatever financial ventures Petitioner considered to be most promising. (A-77a). McAninch also testified, "I don't think he (Petitioner) intended to defraud me, no". (A-87a). In fact, McAninch had even discussed possible new investments with Petitioner after the indictment was returned. (A-70a).

On March 3, 1966, before Petitioner was indicted, Postal Inspector Mitchell Glassman interrogated the Petitioner. He prefaced his interview with the following warning:

> "I informed Mr. Taylor that he had a Constitutional right not to tell me anything that would tend to incriminate him, that he did not have to identify any writing, he did not have to identify any documents, that anything that he said could be used against him in a court of law, that he was

not obliged under any circumstances to talk with me and that if he did talk with me, it would have to be on the basis that the information he furnished me was free and voluntarily given. I then told Mr. Taylor that he had a right to be represented by legal counsel at all times and that if he had legal counsel that it was important that he be represented by legal counsel and that I would wait until the legal counsel appeared, if he so desired". (A-97a).

During the interview that followed, Glassman told Petitioner he was "very receptive to any information he wanted to give me concerning the dispositions of the money...." (A-134a).

At the trial, over Defense objection, Glassman was permitted to give detailed testimony concerning Petitioner's promise to him that Petitioner "would furnish me documentary evidence that the moneys which he had received from Mr. McAninch had not been used for his own personal use. . . . ." (A-134a), and how, between March and November of 1966, Petitioner had failed to comply with numerous requests for the documents giving a variety of excuses for his inability to furnish them. Glassman testified that the documents never were produced by Petitioner. (A-135a).

Petitioner, at the conclusion of the Government's proof, moved the court to withdraw from consideration by the jury all of the testimony of Postal Inspector Glassman. The court overruled the motion whereupon Petitioner moved the court for a judgment of acquittal, which the court also overruled. (A-137a-142a).

Petitioner, at the conclusion of all the proof in the case, renewed his motion to exclude the testimony of

Postal Inspector Glassman and renewed his motion for a judgment of acquittal. The court again overruled both motions. (A-188a-190a).

The court gave the jury this instruction with respect to Glassman's testimony:

> "Now, before I go any further, I do want to point out one or two things with reference to the statement that Mr. Glassman testified was made to him by the defendant. Now, you are instructed that Mr. Glassman's statement, I believe, to the effect that Taylor made certain promises to him to send him some material or something to that effect, that Taylor wasn't bound to do that; he wasn't required under the law to give any evidence against himself or to give the United States any help, or to any of its agents or agencies, toward this prosecution. So you are not to be confused by that; if you believe that such promise was made even though Glassman (sic) did not make (sic) the promise or did not carry it out, he didn't have to do that; that was his prerogative one way or the other. You may consider that in connection with the whole statement if you believe such a statement was made, in determining what the actual factual situation was." (A-204a).

With respect to Petitioner's guilt or innocence of the offense of mail fraud the court's final charge to the jury was that if they found the Petitioner had no scheme to defraud they should acquit the Petitioner; and if they found that he had a scheme "but there wasn't anything that she did or any plan that he had or that he had anything to do with intentionally that caused the mails to be used to send that $5,000.00 check," then Petitioner should be acquitted. (A-208a).

The Defense expressly excepted to the portion of the court's instruction quoted above concerning the

basis for acquittal. The Defense also excepted to the court's instruction on Mr. Glassman's testimony. (A-210a, 211a).

On February 9, 1970, having been granted an extension of time for filing record and docketing appeal, Petitioner noted his appeal to the U.S. Court of Appeals for the Sixth Circuit. On June 12, 1970, the court of appeals affirmed Petitioner's conviction.

A timely petition for rehearing was submitted to the court of appeals which the court denied on July 8, 1970.

REASONS FOR GRANTING THE WRIT

1. The Fourth and Fifth Amendments to the Constitution Were Violated When the Government Introduced Over Defense Objection Evidence of Petitioner's Undertaking and Subsequent Failure to Produce Personal Papers to Prove His Innocence.

This Court held in *Boyd* v. *United States*, 116 U.S. 616 (1886), that the seizure or compulsory production of a man's private papers to be used in evidence against him is the same as compelling him to be a witness against himself, and is within the prohibition of the Fifth Amendment. This Court also held in *Boyd* that it is equivalent to compulsory production of papers, in violation of both the Fourth and Fifth Amendments to the Constitution, to make the non-production of them a confession of the allegations which it is pretended they will prove.

Petitioner asserts that the *Boyd* rationale has *a fortiori* application to this case, which goes well beyond assuming that withheld papers might have implicated the accused, and allows a jury to draw prejudicial inferences from Petitioner's non-production of papers that would exonerate him. In effect, the

jury could have taken Petitioner's failure to deliver exonerating evidence to Glassman as a confession that he *had* diverted McAninch's money to his own use, thus proving the Government's case by Petitioner's inability to disprove it.

Since *Boyd*, this Court has recognized the "intimate relation" between the Fourth and Fifth Amendment protections in other cases, even where State action was involved. *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961); *Malloy* v. *Hogan*, 378 U.S. 1, 9 (1964).

2. The Due Process Clause of the Fifth Amendment Was Violated When the Court Allowed the Jury to Regard Petitioner's Failure to Produce Personal Papers in Proof of His Innocence as Positive Evidence of Guilt.

Nothing is more fundamental to our system of criminal justice than the presumption that an accused person is innocent until found guilty upon competent proof. The Government has the burden of presenting such proof. No requirement can be placed on the accused that he prove his innocence, for he is presumed to be innocent until the Government provides affirmative proof of his guilt.

In this case, having erred initially in permitting Inspector Glassman to testify concerning Petitioner's promise and subsequent failure to supply documentary evidence to exonerate himself, the court erred even more seriously when it instructed the jury it could consider Petitioner's conduct in that instance "in determining what the actual factual situation was." In other words, the jury was free to draw whatever factual inferences they pleased, including an inference that the Petitioner must have misused McAninch's money since he failed to produce evidence to show he used it properly.

Glassman's testimony was crucial to the jury's verdict. The Government's evidence of Petitioner's fraudulent intent could hardly have been weaker. The alleged victim himself testified that Petitioner could fairly have assumed that he had blanket authority to invest McAninch's money as he saw fit. He said he had not requested the indictment, that he had discussed further investments with the Petitioner *after* the indictment, and that he did not believe Petitioner ever intended to defraud him. The inference to the jury that Petitioner had had something to hide concerning his use of the money was actually the *only* basis in the Government's case for finding fraudulent intent.

Thus the Government was allowed to do that which, under the Constitution, it cannot do. It shifted the burden of proof to the accused and relied upon his failure to *dis*prove one of the essential allegations in the Government's case.

3. The Fourth and Fifth Amendments Entitled the Petitioner Under Interrogation to a Warning When Requested to Produce Personal Papers That His Protection Against Unreasonable Searches and Seizures and Self-Incrimination Relieved Him From Any Obligation to Produce Such Papers.

Postal Inspector Glassman had given the Petitioner a standard warning of his rights against self-incrimination designed to apply to any statements Petitioner might make during the interview or any documents Petitioner might be asked to identify. During the interview, Petitioner indicated he had not used McAninch's money for his private enrichment. Glassman then said, in effect, "I'd like to see documentary evidence of that". His previous warning that Petitioner was not obliged to *identify* any documents was wholly

inadequate to apprise Petitioner of the fact that he was not obliged to produce the documents requested. Consequently, Petitioner fell into the trap, promised but failed to deliver the documents, and the jury was allowed to treat his prolonged and futile efforts to fulfill the promise as evidence of guilt.

Inestimable damage would be done to two of our most precious constitutional protections if such procedure were allowed to continue. Accused persons under interrogation, without counsel, inadequately warned, who become intimidated by an interrogator's request for documents to prove their innocence and promise to supply such documents, could henceforth be brought before a jury and literally convicted for having made a foolish promise.

Petitioner urges that this case, as decided below, stands opposed to the principles expressed in *Boyd* v. *United States*, 116 U.S. 616 (1886), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

4. The Erroneous Decision of the Court of Appeals Permits Application of the Mail Fraud Statute to a Myriad of Circumstances Beyond the Appropriate Reach of Federal Jurisdiction.

It was never intended that the federal mail fraud statute should extend to all frauds. This Court has expressed several limitations. First, the fraud must be characterized by some use of the mails as a "part of the execution". *Kann* v. *United States*, 323 U.S. 88, 95 (1944). That part must have more than a mere idle connection; it must be "incident to an essential part of the scheme". *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). Finally the use of the mails charged must

have been "caused" by the accused, and in that regard this Court has said:

> "Where one does an act with the knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." *Pereira* v. *United States*, 347 U.S. 1, 9 (1954).

Without effective adherence to these limitations some rationale could be found for treating almost all modern frauds as violations of federal law.

The requirement of "reasonable foreseeability" with respect to causation places particular reliance upon a circumstantial analysis in each case. Any case, such as Petitioner's, where the courts have found causation with disregard for the circumstances is an unwarranted extention of federal jurisdiction which should not be enshrined as precedent.

Confusion over application of the "reasonable foreseeability" test is apparent in the district court's erroneous instructions to the jury in Petitioner's case, which, when analyzed, left the jury no real choice but to convict once they determined that Petitioner had a "scheme." The court instructed the jury:

> ". . . but if he had such a scheme and it *could* reasonably be understood or within the course of events *might* be known that the mails *could* be or would be used, and he *did cause* them to be used, by his conduct and acts and speech, . . . then he is guilty. . . ." (Emphasis Added)

Having begun by expressing a wholly objective test, downgrading the circumstances and their impact on

this particular accused, the court strayed even further from the mark in a second attempt:

> "... throughout the transaction ... if you believe there was such a scheme and the mails were used by McAninch, even at his own instance and not at the direction of the accused, but that the scheme was such that they resulted in this check being mailed .... and you believe that that was a result of the conduct or acts of the defendant .... that is a use of the mails within the meaning of the statute as set out and contained in this indictment."

Finally, in summing up, the court gave the jury a standard for acquittal that left them no rational alternative but to convict if they found a "scheme":

> "... if you believe that he did have a scheme, but there *wasn't anything that he did* or any plan that he had or *that he had anything to do with intentially* that caused the mails to be used to send that $5,000 check, and you so believe, you should find him not guilty." (Emphasis Added)

It is totally unreasonable to maintain that the use of the mails charged in this case was "incident to an essential part of the scheme." The only mode of transfer of funds discussed by both parties and suggested by all the circumstances was personal delivery. Even when the Petitioner returned to Danville for a time, nothing in the record indicates that anything was expected to be gained by mailing a check to him that could not have been accomplished just as well by awaiting his return to Jackson.

Thus, the court failed to come to grips with the real question for the jury, whether under all the circumstances this accused should have foreseen that the

execution of any essential part of his scheme involved a reasonable chance that the mails might be used in the manner that the mails subsequently were used.

The court of appeals' per curiam order affirming Petitioner's conviction, citing *Pereira*, compounded the confusion and can only be rationalized on the basis of false premise. The court could not possibly have reconciled *Pereira* with the circumstances set out in the trial record unless it concluded that, as a matter of law, the mere existence of an intermittent geographic separation between parties involved in an allegedly fraudulent transaction is sufficient to charge an accused with reasonable anticipation that the mails might be used, even in a manner contrary to agreed modes of procedure.

This decision constitutes a material extension of federal jurisdiction beyond any point previously charted under the mail fraud statute, either by lower courts or by this Court itself. It deserves close examination, for Petitioner respectfully submits that it holds the potential for a wrongful and unnecessary proliferation of federal prosecutions at the expense of State law.

CONCLUSION

For these reasons a writ of certiorari should issue to review the order of the Sixth Circuit.

Respectfully submitted,

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No. 20,183

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

vs

OSCAR EVERETT TAYLOR, JR., *Defendant-Appellant*

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

Per Curiam Order

Decided June 12, 1970.

Before WEICK, PECK and BROOKS, Circuit Judges.

This appeal is from a judgment of conviction for causing the mails to be used in a scheme to defraud; in violation of 18 U.S.C. § 1341.

Fifteen alleged errors are pointed out in the brief of appellant. We have carefully examined all of appellant's contentions and find they are without merit. There was substantial evidence to support the verdict of the jury. We find no error in the admission of testimony or in the Court's instructions to the jury. Particularly; under the evidence in this case the defendant could reasonably have foreseen that the mails would be used in carrying out his scheme to defraud. *Pereira v. United States*, 347 U.S. 1 (1954).

The judgment of conviction is affirmed.

ENTERED BY ORDER OF THE COURT.

/s/ CARL W. REUSS
Clerk

No. 20,183

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

vs

OSCAR EVERETT TAYLOR, JR., *Defendant-Appellant*

Order

Before WEICK, PECK and BROOKS, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT.

/s/ CARL W. REUSS
Clerk

Excerpt from Testimony of Mitchell Glassman—Direct

Q. Was there any discussion between you and Mr. Taylor about his offering documentary proof to you that this money had not been used for his own personal use? A. Yes, sir, there was.

Q. What was that? A. I told Mr. Taylor that I was very receptive to any information he wanted to give me (Tr. 232) concerning the dispositions of the money and he said he would be glad to do this and that in the future, near future, he would furnish me documentary evidence that the monies which he had received from Mr. McAninch had not been used for his own personal use and he told me that—

Q. Well, did he ever furnish that?

MR. LOWERY: If the Court please, might we approach the bench just a moment?

THE COURT: Yes, sir.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the Court, in the presence but out of the hearing of the jury)

MR. LOWERY: If the Court please, the witness is about to testify, as we understand it, that he requested that Mr. Taylor furnish him with certain memoranda and that the testimony about to be elicited now is that Mr. Taylor never did do so. The point we wish to make, Your Honor, is that this witness has testified at some great length about how he advised him that he didn't have to testify, he could stop the conversation any time he wanted to. They are now attempting to use Mr. Taylor's failure to go ahead and further incriminate himself as substantive evidence against him and we do not think that the jury can properly consider (Tr. 233) Mr. Taylor's failure to further furnish evidence against himself in this case.

THE COURT: Overruled.

MR. LOWERY: All right, sir.

(THEREUPON THE COLLOQUY AT THE BENCH ENDED)

Q. Did Mr. Taylor ever send you any proof reflecting that he had not used these funds for personal uses? A. No, sir, he did not. He contacted me a number of times between March 3rd, 1966, and I believe it was the latter part of November 1966, and told me on various occasions that he would have the records in my possession within ten days, he had some difficulty finding them.

The next telephone call in August, he told me that he had located the records in Las Vegas, Nevada, that he was going to make photo copies of them and send them to me and he said that these would reach me no later than September 15th, 1966. And then, on November 9th, a telegram was received by me in which he, if I recall, said that his mother had died and that this had interfered with him sending them to me and that he would send the docu-

ments to me very soon; and then on October 17th, he telephoned me and said that he had more difficulty with the documents but that he (Tr. 234) would make photo copies of the necessary documents, send them to me, and that he would contact me during the week of November 28th, 1966.

A telephonic conversation on November 17th, 1966, to the best of my recollection, is the last contact I ever had of any kind with Mr. Taylor until here.

Charge of the Court

THE COURT: Members of the jury, it is now my duty to instruct you as to the law in this case. Very frequently, cases such as this, dealing with language that is not ordinarily used and referring to documents, debentures and to various other terms, trust securities, the jury may get the impression, "Well, I (Tr. 360) just don't understand what it is I have to decide." Well, that is not true. You are perfectly qualified to decide this case and before I conclude my charge to you, I will give you a very sharp issue. You will have no difficulty in recognizing what it is you have to decide and in the light of the evidence you should decide the case one way or the other. I personally have no interest in this case, whether the United States is successful in its prosecution or the defense is successful in obtaining an acquittal. I am, however, deeply concerned about one thing and one thing only, and that is that any judgment which goes upon the records of this court shall be a fair and a just judgment. This court is the most important thing in the world. This is the administration of justice on which all other functions and purposes of government must necessarily rest. Without that, the rest of it is merely fiction.

Now, I will enter the judgment, but it must necessarily be based upon your verdict and so if your verdict is fair and just, the judgment will be fair and just and this Court

will have fulfilled its highest function. If your verdict is unfair or unjust, then the judgment which is based upon that verdict must necessarily be unfair and unjust. So I appeal to you (Tr. 361) to ignore every other fact and not let sentiment, do not let prejudice, do not let any feeling of any kind enter into your consideration on your determination, but abide strictly by the terms of your oath, both in the letter and in the spirit, that you will try this case fairly and impartially and base your decision solely upon the evidence as heard from the witness stand and the reasonable inferences which may be drawn from it, in the light of the law as given you by the Court.

I don't want you, as I say, to feel that you cannot decide the case because you can and you should. We have, as we know, in this country what is known as a hung jury, where the jurors are unable to agree. That may be so in this case. You may not be able to agree, but if you do not agree, it means the case will have to be tried again. Some jury some day has got to decide this case and I know of no better jury than this one to do it. So, I call your attention to the fact that it is your duty to decide it if you feel that you can conscientiously do so and dispose of it finally. The United States Attorney has discharged his duties, the defense counsel have discharged their duties, the witnesses have testified, the Court instructs the jury and conducts the trial, and now it becomes the duty of the jury, if they feel that they can, to make (Tr. 362) a verdict.

Now, I do not mean by what I have to say to undertake to influence you in any way. There are, as we all realize, times when people can take any given set of facts and come to definite, contrary conclusions on what the facts show. It is the prerogative of the jury and the prerogative of the juror to decide the case and if you feel, after having given it due consideration, that you cannot agree, then it is your duty to report that fact to the Court. I merely

emphasize, as I say, that you should if you feel that you can do so, make a verdict. I have no interest, as I say, in the decision in the case. I could not require you to make a verdict if I wanted to and I wouldn't if I could. That is your prerogative under our system of the administration of justice, but I merely emphasize to you that it is a responsibility which you should face up to and in the light of the record, reach a verdict if you can conscientiously do so.

Now, in the first place, this defendant is presumed to be innocent until his guilt is established to your satisfaction to the exclusion of a reasonable doubt. That presumption of innocence starts with him at the outset of the case and continues with him throughout the trial and must be overcome by evidence. (Tr. 363) If, on the whole case, you have a reasonable doubt of his guilt having been established, then you should find him not guilty. It's the responsibility and duty of the United States to convince you to the exclusion of a reasonable doubt that this defendant is guilty of the offense charged in this indictment. However, the term reasonable doubt means just what it says and that is it is a doubt based upon reason, not some inconsequential doubt, not some slight mental hesitation that might flit through the mind of a juror, but a doubt for which there is reason, such a doubt as might guide you in determining the ordinary affairs of life. The United States is required to prove its case beyond a reasonable doubt; it is not required to prove its case beyond all doubt. Few things are capable of proof to absolute certainty. If it were necessary to remove all doubt from the mind of each of twelve jurors before a conviction could be had, it would be practically impossible to enforce the criminal laws.

So, in considering the instruction on reasonable doubt, bear in mind that it is such a doubt as gives you a genuine mental hesitation or a doubt for which there is reason.

Your verdict must be unanimous, that is, it must be the verdict of each juror. You cannot (Tr. 364) arrive at your verdict by holding a primary election or taking a majority or any other percentage of the number of jurors, but it must be the verdict of each juror. I do not mean to say by that that you should go to the jury room and immediately take a uncompromising and arbitrary stand that you are right and the rest of the jurors are wrong.

I have never served on a jury, but I have known a lot of people who have and they tell me that at times you go to the jury room and one or two or three of the jurors will immediately announce what the verdict should be and everybody will have to agree with them or they will stay there all day or all night or some other such extravagant statement, mistaking, I am afraid, hard-headedness and stubbornness for strong-mindedness. I know this jury is not going to do that. This jury has had experience. This is a good jury. It must be the verdict of each juror. That means, however, that you are to bear in mind that there are twelve people on the jury, not one, three, seven, nine, but twelve, with the idea that twelve disinterested people can take a given set of facts and after discussing them together can come to fair and reasonable conclusions. So, before you make up your mind finally, you should give due regard to the reasoning, recollection (Tr. 365) and arguments of your fellow jurors. If, however, after that you are of one mind, or your own opinion, I would not, as I say, undertake to influence you to go against your own conviction or your own conscience.

Now, the indictment in the case, which consists of only one count, is merely the charge. You are not to give any evidential consideration to the indictment. It is not evidence. It has no bearing as evidence whatsoever upon the case. It is merely the statement of what the United States through the grand jury represents to you are facts on which the defendant is charged with the commission of a

crime. But the only thing which you can reach your verdict on is from evidence on the witness stand and the indictment, itself, has no evidential value.

In the federal courts it is the privilege and sometimes the duty of the trial judge to comment on the evidence. I don't know that I shall do that, certainly not to any great extent; but if I do, you are not to accept what I may say as all of the evidence; you are not to accept what I may say as all of the important evidence or all of the important evidence on a given point. You are not to accept what I may say as necessarily true. I would not, of course, intentionally make a misstatement, but you are the triers of the facts (Tr. 366) and it will be for you to decide what the evidence is and what reasonable inferences may be drawn from it.

Now, this case is based largely upon intent. The word "intent" as used in this instruction is a legal term and yet it is also a well-understood, everyday, English word. What a person intends to do or what is his intent, in what he says or what he does, is a thing with which most of us come in contact every day and many times a day as a rule. I am sure you understand what intent means in your everyday contacts and the same thing is true here.

Under the law a person cannot be held to be answerable for an offense unless he intended to commit the offense. Now, so far science has not reached the place where you can open a person's head and look into his brain and say what he intended to do. What does he intend? That is a spiritual, intangible phase of a person's being that cannot be reduced to a tangible substance. And so the law places upon it the next best way to arrive at what a person intends to do, and that is the law says that a person is presumed to intend to do the natural consequences of his own deliberate acts and you may judge what he intended to do by what he did and the result of the facts which you do have before you, subject to your determination of

what they (Tr. 367) were or their admission. But this defendant cannot be convicted of this offense if you conclude that it was done without any intention on his part to commit the alleged offense.

Now, the nature of this case is based upon a statute of the United States and I am going to paraphrase this statute and read it to you, which I think expresses it as simply and clearly as it could be given to you by any other means. The law provides that:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter of thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, . . ." shall be guilty of a crime against the United States and subject to punishment.
(Tr. 368)

Now, that is what this case is and you have two things to decide and two things only. In the first place, do you believe that this defendant, Oscar Taylor, had in his mind on or about the time set forth in this indictment, that is May and June of 1964, a plan or a scheme to defraud Mr. McAninch? Do you believe that he had an intent to defraud the prosecuting witness, McAninch, and to get from him by means of this scheme or this plan, a sum of money? You don't have to say it was $11,040 or any other particular sum, but any sum. If you say that he did have such a scheme, then you go on to the second phase of the case. The first thing you decide is: Was there in the mind of this accused a scheme or a plan to defraud McAninch?

If you say that there was no such scheme, then you should find the defendant not guilty and that ends the case. If you say that there was such a scheme in his mind and a plan, then the next thing is, Did he cause the United States mail to be used to carry out that scheme? Now, he doesn't have to have in his mind a plan to cause the United States mails to be used to carry out a scheme to start with, but if he had such a scheme and it could reasonably be understood or within the course of events might be known that the mails could be or would be used, and he did cause them to be (Tr. 369) used, by his conduct and acts and speech, any or all of those, and they were used to carry out this scheme and fraud, then he is guilty, if you believe that fact as I have instructed you, to the exclusion of a reasonable doubt. If he did not cause the mails to be used then he is not guilty, even though you may believe that he had a scheme. He is not accused here of just having a scheme. This is a federal case and the basis of the federal concern is that he used the mails. So a person may have a very elaborate scheme to defraud, that may be under certain circumstances and facts a violation of the laws of Mississippi or a violation of the laws of Kentucky, but the United States has no concern about them until the mails are used to carry out some part or all of that scheme; and then when he uses the mails or causes the mails to be used by his acts, by his conduct, then the United States is concerned that he has abused this statute and has desecrated the use of the mails.

Now, that doesn't mean to say that he has by doing—of course, the perfect case is that when a person writes a letter, we will say, and demands money of someone or sets forth some plan or scheme to induce somebody to mail him back a check and he drops a letter in the slot in the post office and gets the (Tr. 370) check back in the post office or under the delivery of the mails. That is the perfect case. But the United States is not required to prove it in that way. If he causes somebody to use the mail to carry out

his scheme, it does not mean that he has to say, "Now, you use the mails to send me this money," or, "You go mail this to me." That doesn't mean that they have to establish the fact that that language and that conduct was employed by the accused, but if throughout the transaction, carrying out the scheme, if you believe that there was such a scheme and the mails were used by McAninch, even at his own instance and not at the direction of the accused, but that the scheme was such that they resulted in this check being mailed on June the 8th, 1964, to the defendant here in Kentucky, and you believe that that was a result of the conduct or acts of the defendant, either acting of his own accord or in collaboration with McAninch, and you believe that fact to the exclusion of a reasonable doubt, that is a use of the mails within the meaning of the statute as set out and contained in this indictment.

Now, before I go any further, I do want to point out one or two things with reference to the statement that Mr. Glassman testified was made to him by the defendant. Now, you are instructed that (Tr. 371) Mr. Glassman's statement, I believe, to the effect that Taylor made certain promises to him to send him some material or something to that effect, that Taylor wasn't bound to do that: he wasn't required under the law to give any evidence against himself or to give the United States any help, or to any of its agents or agencies, toward this prosecution. So you are not to be confused by that: if you believe that such promise was made even though Glassman did not make the promise or did not carry it out, he didn't have to do that: that was his prerogative one way or the other. You may consider that in connection with the whole statement if you believe such a statement was made, in determining what the actual factual situation was.

Now, members of the jury, I have told you that I am going to draw you a sharp issue to decide and I have given you this background as best I can—I hope clearly enough.

Sometimes I think that you can overinstruct a jury. I know the story of "Old Hickory" Jackson, Andrew Jackson, when he was a district judge in Nashville, Tennessee. They say that he never gave but one instruction to the jury and that was "to go out and do right between these people", which is a pretty good instruction, and that's what I want you to do, too. But I do have to give you these rules of law (Tr. 372) to, hopefully, guide you in reaching that conclusion.

There are two theories to this case. The United States says that this is a deliberate plan and scheme on the part of the defendant Taylor, that he never had any legitimate enterprise to sell to Mr. McAninch, that they met down there in Jackson, practically total strangers, and a tie of membership in a lodge brought them into contact and naturally lodge brothers had more or less respect, I assume, and confidence in each other; and that the defendant Taylor was a confidence man, that he saw a chance to take advantage of a trust which McAninch was placing in him, and that he as a super salesman convinced McAninch that he was engaging in legitimate enterprises in Kentucky, and that he could take his money and invest it for him and that he could have substantial return on it; and that McAninch, relying upon that, did on two occasions give him checks for a thousand dollars and on another occasion mailed him a check for $5,040, and on another occasion gave him $4,000, making him $11,040 in all; but, according to the theory of the United States, it was a deliberate plan made out of whole cloth, without any thought of doing anything but getting this man who trusted him to send him $10,000 on strictly a phony proposition; and that by doing that, he thereby set in (Tr. 373) motion what resulted in using the mails to defraud; if he hadn't done that, the mails wouldn't have been used, there wouldn't have been any mailing of a $5,040 check, and that thereby he caused McAninch to mail the letter containing the $5,000 check. And that is this case, that is the theory of the United

States, and in order to establish that theory, they proved that he got the $2,000 with the first two checks and $5,040 and never made any investments of anything into anything, put it to his own private, personal account and started using the money and never did repay it, which has been some years ago, never repaid it up until the time the indictment was returned, which was two and a half years later 1967, and that these facts and circumstances, all lined up and coupled together, present a clear case of a plan and a scheme in which the mails were used as a result of the conduct of the defendant, and the case is established to the exclusion of a reasonable doubt.

Now, the defendant says, as I think was stated by his attorney's opening statement, there wasn't too much difference as far as the factual situation went between what the defendant claims and what the government claims. They admit that there was this relationship between Mr. and Mrs. McAninch and the defendant and the circumstances out of which that contact (Tr. 374) grew, and the fact that they did get the money, $11,040 and that the letter was mailed by Mr. McAninch and it was received by the defendant and that he did put the money to his personal account. But it is the deductions that differ. The defendant says that that was all done, that he was a promoter, that was his business, that he wasn't dealing with a child, that he wasn't dealing with an inexperienced person: he was dealing with a business man who had money that he wanted to invest and that he told him that he could invest in this Insurance Investors debentures here in Kentucky, that he would have to take them in his own name or in some other name, because under the law of Kentucky they could not be held by people outside the state, and McAninch on the witness stand testified that that's what he understood: and that when he got the money, he did not invest it at that time because he felt that there might be something better coming up: that here in Lincoln County they had this great oil boom and that with full knowledge on the

part of McAninch, he got other money from him, and was going to invest in some of the leases or some of the working rights of the oil development, and that McAninch knew this, understood this, and sent or delivered to him the money which he had in mind; and he was a business man trying to make a good investment, (Tr. 375) he thought it was a good investment, and McAninch thought it was a good investment, and a lot of people thought it was a good investment, including the man who was brought here to testify that he was in charge of the development; and that he never caused him to send him the check through the mail, that McAninch volunteered to do it, and that it wasn't the result of any plan or scheme on his part that the check was mailed, but purely on the part of McAninch who was sending money to him, to be invested, and that when the oil boom sort of subsided, that he then with McAninch's agreement and understanding was going to invest in Taylor Brothers Company or partnership arrangement, which was a plan to find sites and arrange for the development and building of various enterprises, and that all of these were free and voluntary on the part of McAninch, with full knowledge of the circumstances. Unfortunately, as he said, through the fault of no one, these bubbles burst and these legitimate enterprises, in which McAninch has invested, or had sent money for him to invest, which he didn't invest, went bankrupt, literally or actually—I don't know—that is brought out, whether they actually went bankrupt; but at any rate, they went broke, to use a well-known term, and there was no money and he felt a personal obligation to refund McAninch for his (Tr. 376) money, then more or less considered as a loan on an investment to pay off these enterprises, and that he intends to pay it back and he had no idea or no scheme, no plan, to use any mails, or no suggestion from him or in any way that McAninch use the mails; McAninch did it solely on his own as a man might send a check to be invested in any kind

of legitimate enterprise, which this was, as he says, at the time.

Now, that, members of the jury is for you to decide. First, do you believe that this defendant had such a scheme as I more or less outlined them to you? If you believe that he didn't have any such scheme you should find him not guilty. Second, do you believe that he had such a scheme and if you believe that he did have a scheme, but there wasn't anything that he did or any plan that he had or that he had anything to do with intentionally that caused the mails to be used to send that $5,000 check, and you so believe, you should find him not guilty. If, on the other hand, you believe "That from on or about May 1, 1963, and continuing thereafter until on or about June 30, 1964, Oscar Everett Taylor", the defendant, "unlawfully, wilfully and knowingly devised and intended to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and (Tr. 377) "promises from Kenneth C. McAninch, well knowing at the time the pretenses, representations and promises would be and were false and fraudulent when made, which said scheme and artifice to defraud so devised and intended to be devised by the said Oscar Everett Taylor. . . ." as described in the evidence from the witness stand, and

"On or about the 11th day of June, 1964, at Danville, Boyle County, in the Eastern District of Kentucky, the said Oscar Everett Taylor, Jr., for the purpose of executing the aforesaid scheme and artifice to defraud and attempting so to do, unlawfully, wilfully and knowingly caused to be delivered by the Post Office Department of the United States in accordance with the directions thereon a letter addressed to Mr. Oscar Taylor, 316 Twinbrook Drive, Danville, Kentucky," and your belief in that respect is to the exclusion of a reasonable doubt, then you should find the

defendant guilty. Unless you so believe or if you have a reasonable doubt of his having been proven guilty, you will find him not guilty.

Elect one of your number foreman and the foreman will sign the verdict of the jury. Write it on the back of the indictment, right here. "We, the jury, find the defendant guilty," or, "We, the jury, (Tr. 387) find the defendant not guilty," and have your foreman sign the verdict.

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No. 305

In the Supreme Court of the United States

OCTOBER TERM, 1970

OSCAR EVERETT TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 501

OSCAR EVERETT TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1970. A petition for rehearing was denied on July 8, 1970. The petition for a writ of certiorari was filed on August 5, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED.

1. Whether it was proper to introduce evidence that petitioner volunteered to produce exculpatory

405-743—70

documents during the pre-trial period, but failed to do so.

2. Whether the evidence showed that petitioner caused the use of the mails.

STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of Kentucky of mail fraud in violation of 18 U.S.C. 1341 and sentenced to two years' imprisonment. The Court of Appeals for the Sixth Circuit affirmed, *per curiam*.

The principal witness for the United States was Kenneth McAninch of Jackson, Mississippi. He met petitioner at a Masonic training session in Jackson which lasted several days (A. 59, 148). Petitioner talked to McAninch about investing certain surplus funds in debentures issued by the Insurance Investors Trust Co. of Louisville, Kentucky. Petitioner represented himself as being a division sales director of the company (A. 124). He suggested to McAninch that since Kentucky laws would prevent McAninch, a non-resident, from holding the securities in his own name, he should give his money to petitioner. Petitioner promised to invest the money in his own name and pass the profit on to McAninch (A. 151). McAninch then gave petitioner two checks totaling $2,000 for purchase of the debentures (A. 60, 152). Petitioner thereupon left Jackson for Kentucky and deposited the money in his own and his wife's accounts (Tr. 241).

Subsequently, petitioner and McAninch talked on the phone several times. On June 8, 1964, McAninch sent

petitioner, by certified mail, a cashier's check for $5,040 for the purchase of more debentures (A. 60-61). He then called petitioner to tell him that the check was on its way. Petitioner told McAninch that he need not have done so as petitioner would be returning to Jackson soon (A. 153). Nevertheless, petitioner signed for the letter and cashed the check (A. 62). Petitioner did return to Jackson on June 16, and there induced McAninch to give him an additional $4,000 for investment in the debentures and also in another company, Deepwell Petroleum (A. 64).

Several times thereafter, McAninch telephoned petitioner in Kentucky, asking that he send the debentures and, later, that he send back McAninch's money (A. 68, 69). Finally, in March or April of 1969, petitioner admitted to McAninch that none of the money had ever been invested in the debentures or in Deepwell stock but promised to return the money (A. 69).[1] Of the total of $11,040 McAninch had "invested," petitioner returned $1,000 to him (A. 70).

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[1] On cross-examination, counsel for petitioner asked McAninch if "Mr. Taylor could reasonably have concluded, based on your entire relationship, that you had turned money over to him to be invested by him on your behalf in fields and ventures which he considered most financially rewarding to you?" To this, McAninch replied "He perhaps did" (A. 77). However, McAninch never specifically authorized any other investments than Deepwell and Insurance Investors, and petitioner never advised McAninch that any such investments had ever been made (A. 70). Indeed, no evidence ever appeared to indicate that petitioner had invested McAninch's money in anything.

ARGUMENT

I. When this matter came to the attention of the government, petitioner was interviewed by a postal inspector. The inspector fully advised petitioner of his rights; stressing his right to have counsel present and to terminate the interview at any time (App. 98a–99a). At that interview, petitioner stated that he had in fact invested McAninch's money in legitimate enterprises and could produce documentary evidence to prove it. The postal inspector responded that he would be "very receptive" (A. 134) to any exculpatory material which petitioner could produce—as, indeed, any officer investigating the issue whether or not to prosecute properly should be. The inspector in no way demanded such material; the suggestion of producing it was made by petitioner. Nor did petitioner ever withdraw his offer on the ground that he had concluded it might incriminate him. Rather, petitioner contacted the postal inspector on several subsequent occasions, promising faithfully to produce the documents; but he never did so (A. 135).

After a hearing, the trial judge concluded that the statements made to the postal inspector Glassman, including those relating to the promise to produce documents, were given freely and voluntarily and hence were admissible (App. 113a–114a). The judge specifically instructed the jury that petitioner was under no obligation to produce the papers (A. 204).

In all the circumstances, petitioner's volunteered promises and subsequent non-compliance therewith were properly introduced in evidence against him.

The situation is wholly unlike that in *Boyd* v. *United States*, 116 U.S. 616, where a statute compelling production of papers under penalty of having judgment based upon non-production was held to violate the Fifth Amendment. There was no compulsion of any kind in this case.

2. Petitioner contends that the evidence does not show that he caused the use of the mails. As he recognizes, one is held to have caused the mails to be used under 18 U.S.C. 1341, if such use will follow in the ordinary course of business or can be reasonably foreseen. *Pereira* v. *United States*, 347 U.S. 1, 9. In this case, by first encouraging McAninch to invest money with him and then going to a different state, petitioner could reasonably have foreseen that McAninch would use the mails to send him a check. It was not necessary that petitioner either "know" or "intend" that such use of the mails would occur. *United States* v. *Scandifia*, 390 F. 2d 244, 250 (C.A. 2), vacated on other grounds, 394 U.S. 310.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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